THE FRENCH VEIL BAN: A TRANSNATIONAL LEGAL FEMINIST APPROACH

Sital Kalantry*

I. INTRODUCTION

After the gruesome terrorist attack that killed eighty-four people in Nice, many beach towns in France began to ban Muslim women from wearing the "burkini" on beaches.[1] The burkini, which was created by an Australian designer, is modest swimwear that covers the body and hair.[2] The Nice attack occurred on the heels of a series of attacks in France.[3] The timing of the French burkini ban suggests it was targeting Muslims due to the anger over the attacks. The argument that burkinis are not hygienic is a fig leaf for other more pernicious justifications.[4] Others argue that religious garb generally contravenes the French vision of secularism.[5] Another line of attack against the burkini relates to gender equality. For example, the French Prime

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* Clinical Professor of Law, Cornell Law School. Thank you to Professors Michele Gilman and Margaret Johnson for inviting me to speak at the annual conference of the Center on Applied Feminism. I am also grateful to the editors of the University of Baltimore Law Review for their terrific editorial work. This article is based on chapters from a book I have written, *Women's Human Rights and Migration: Sex-Selective Abortion Laws in the United States and India* (forthcoming 2017).

1. Sahar Bandial, *The Burkini Ban,* EXPRESS TRIBUNE: OPINION (Aug. 21, 2016), http://tribune.com.pk/story/1166690/the-burkini-ban/; Alan Yuhas et al., *Nice Attack: Truck Driver Named as France Mourns 84 Killed in Bastille Day Atrocity—As It Happened*, GUARDIAN, https://www.theguardian.com/world/live/2016/jul/14/nice-bastille-day-france-attack-promenade-des-anglais-vehicle (last updated July 16, 2016).
2. Shoba Rao, *The Australian Inventor of the Burkini Says Recent Bans on the Swimsuit in France Are 'Unfair,'* NEWS.COM.AU (Aug. 25, 2016, 9:28 PM), http://www.news.com.au/lifestyle/fashion/the-australian-inventor-of-the-burkini-says-recent-bans-on-the-swimsuit-in-france-are-unfair/news-story/be6b7b5bb5e9d657bf671891ff8de048.
3. Faith Karimi, *Attack in Nice: New Terror in France Months After Mass Shooting*, CNN (July 15, 2016, 8:23 AM), http://www.cnn.com/2016/07/15/europe/terror-attacks-nice-why-france/.
4. Anya Cordell, *Burkini Bans, Muslim 'Hygiene,' and the History of the Holocaust*, HUFFINGTON POST (Aug. 25, 2016, 2:51 AM), http://www.huffingtonpost.com/entry/new-kind-of-swimsuit-trauma-i-hatewhat-that-muslim_us_57b68c08e4b007f18197839f.
5. Bandial, *supra* note 1.

Minister argues that the burkini reinforces the "enslavement of women."[6]

In this article, I will focus on arguments that justify bans on Muslim women's religious clothing on the basis that they are oppressive to women.[7] In large part, women who wear the full-face veil are themselves migrants or the progeny of migrants. I will examine the French debates surrounding the ban of the full-face veil in 2010 and the European Court of Human Rights decision that upheld that veil ban.[8] This discussion illustrates that policymakers, feminists and other stakeholders in migrant-receiving countries decontextualize immigrant women's behavior. That is, their understanding that the veil is oppressive to women in France is sometimes informed by their understanding of the practice in foreign countries. Decontextualization attributes meaning to a practice that it may not have and also fails to recognize the distinct meaning the covering gains in France, a region where Islam is a minority religion.

On the other hand, I will argue that when policymakers in migrant-receiving countries should be open to the possibility that even if they perceive that a practice is oppressive to women in the foreign country, they should not automatically assume that the practice undermines women's rights in the migrant-receiving country.[9]

Feminist legal theories have been very successful in providing a lens to evaluate laws and regulations from the perspective of women's equality.[10] However, American feminist legal theory has generally not been open to the view that practices can change meaning so radically when they are undertaken in different geographical contexts.[11] This position is understandable because

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6. Catie L'Heureux, *French Prime Minister Supports Banning the Muslim Burkini, Supposedly to Free Women from 'Enslavement,'* N.Y. MAG. (Aug. 17, 2016, 3:29 PM), http://nymag.com/thecut/2016/08/french-prime-minister-supports-france-burkini-ban.html.

7. Some Muslim women may also wear a loose headscarf, a cloth that covers all the hair, or a full-face covering, and it may also include a loose black covering over the entire body. Russell Goldman, *What's That You're Wearing? A Guide to Muslim Veils*, N.Y. TIMES (May 3, 2016), http://www.nytimes.com/2016/05/04/world/what-in-the-world/burqa-hijab-abaya-chador.html; James Vyver, *Explainer: Why Do Muslim Women Wear a Burka, Niqab or Hijab?*, AUSTL. BROADCASTING CORP., http://www.abc.net.au/news/2014-09-23/why-do-muslim-women-wear-a-burka-niqab-or-hijab/5761510 (last updated Oct. 2, 2014, 12:19 AM).

8. *See infra* Parts IV–V.

9. *See infra* Part VI.

10. Martha Albertson Fineman, *Feminist Legal Theory*, 13 AM. U. J. GENDER & SOC. POL'Y. L. 13, 15 (2005).

11. *See, e.g.*, Sital Kalantry, *Sex Selection in the United States and India: A Contextualist Feminist Approach*, 18 UCLA J. INT'L L. & FOREIGN AFF. 61, 64–65 (2013) [hereinafter Kalantry I] ("Pro-choice groups have typically taken universal

these theories were largely aimed at assessing and addressing women's inequality in one country's context and developing legal remedies to address those harms.[12] I build on American feminist legal theory to propose a transnational feminist approach.

The thrust of international human rights theory supports the conclusion that if a practice is seen as discriminatory against women in one context it will also have the same impact in another context. The dominant discourse among scholars and practitioners alike views rights as "universal."[13] In other words, if a practice violates a right (such as the freedom from gender discrimination) in one country, that same practice undertaken in another country is also deemed to violate human rights. In contrast to universality is cultural relativism.[14] A strong cultural relativist would argue that even traditional or religious practices that deprive women of autonomy and equality by most objective standards do not contravene human rights.[15] Under that view, human rights themselves are defined by culture and religion. While I disagree with this framing of cultural relativism, I think that some practices that are brought by immigrants from one country to another cannot simply be explained by universalism. I call these practices "cross-border practices." The transnational feminist approach I propose opens a theoretical space between cultural relativism and universality with the aim of evaluating whether or not cross-border practices are oppressive to women.[16] In this article, I do not draw a conclusion about whether or not France's full-face veil ban adopted in 2010 is consistent with gender equality or is

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positions on sex selection bans, arguing that bans on sex selection should not be put into place in the United States, India, or elsewhere.").

12. *See, e.g., id.* ("[T]he pro-life movement has been increasingly using information, often framed in a distorted way, about the practice and reasons for sex selection abortion in foreign countries.").

13. *See, e.g., What are Human Rights?*, U.N. HUM. RTS.: OFF. HIGH COMMISSIONER, http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx (last visited Dec. 19, 2016) ("Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status.").

14. Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 59 (1993) ("Because the meaning of human rights is substantially different from culture to culture, relativists claim that international human rights law is meaningless.").

15. *See* Mahnaz Afkhami, *Cultural Relativism and Women's Human Rights*, MAHNAZ AFKHAMI (Jan. 1, 2000), http://www.mahnazafkhami.net/2000/cultural-relativism-and-womens-human-rights/.

16. *See infra* Parts II–III.

oppressive to women. Rather I demonstrate why a transnational feminist framework would be helpful in sorting through that question.

In Part II, I explain the limitations of feminist legal theories and international human rights law in understanding cross-border practices.[17] In Part III, pushing feminist legal theories in transnational directions, I outline the broad features of an approach that takes into account both the context of the country of origin and country of destination of the migrant.[18] In Part IV, I demonstrate how arguments in support of a veil ban in France relied on the views that the veil is repressive to women in other countries.[19] In Part V, I explain how the European Court of Human Rights unduly relied on justifications for a veil ban from another context when evaluating the French veil ban.[20] In Part VI, I describe a methodology to evaluate veil bans in migrant-receiving countries.[21]

II. CONTEXT AND RIGHTS IN FEMINIST LEGAL THEORIES AND INTERNATIONAL HUMAN RIGHTS LAWS

Traditional American feminist legal theories were successfully used in the United States to push for women's equality. These theories emerged to address inequalities in one domestic context—the United States.[22] Liberal feminists promoted gender-neutral laws in all situations without regard to their impact.[23] While cultural feminists took into account social context, it was always fixed; women had certain shared traits (although the traits were different from men's traits).[24] Anti-subordination legal theorists also emphasized the difference between men and women.[25] Yet they believed that since men and women were not equal in society, treating them the same in the law would not necessarily promote equality.[26] But again, for these feminists, context is fixed and unchanging.[27] Consequently, it seems that liberal feminists, cultural feminists, and dominance feminists would all agree on one thing: if a

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17. *See infra* Part II.
18. *See infra* Part III.
19. *See infra* Part IV.
20. *See infra* Part V.
21. *See infra* Part VI.
22. *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 21–22 (1988).
23. *Id.* at 22.
24. *Id.* at 13.
25. *See, e.g.*, Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 202–03 (1989).
26. *Id.* at 201.
27. *See* Kalantry I, *supra* note 11, at 78–79.

policy promotes women's equality in one country's context, then it has the same impact in a different country's context.

In addition, international human rights theory and practice also suggests that once a practice is determined to be oppressive to women in one context, it is presumed to be oppressive when it emerges in a totally distinct context of another country.

A. *Context in Traditional Feminist Legal Theories*

Contemporary legal feminism traces its roots to the 1970s, when early feminist activists struggled against laws that were formally unequal.[28] They pushed for women to be able to engage in traditionally male-dominated activities.[29] Prior to the 1980s, many laws contained sex-based distinctions.[30] For example, only women could receive alimony, only men could be drafted, and the age of majority was different for men and women.[31] Essentially, laws were motivated by the idea that a woman's appropriate role was in the private sphere of family and the home.[32] This form of feminism, which reacted against such laws, is often referred to as "liberal feminism."[33]

In the 1970s, court victories erased many formal gender-based distinctions in the law. One prominent example is the case of *Reed v. Reed* where the U.S. Supreme Court held a statute that permitted only men to be executors of an estate unconstitutional.[34] It should be noted that 1970s feminists would advocate not only for changing laws that benefit only men, but also for changing laws that benefit only women. For example, they helped to eradicate the "tender years doctrine," which gave women preference in child custody cases.[35] These feminists emphasized "women's similarity to men."[36] Most liberal feminists would not push the law beyond formal equality with men.

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28. *See, e.g.*, Cain, *supra* note 25, at 197.
29. *See id.* at 211–12.
30. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 270 (1979).
31. *See, e.g., id.* (questioning whether "Alabama alimony statutes which provide that husbands, but not wives, may be required to pay alimony upon divorce" are constitutional).
32. *See id.* at 279–80.
33. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 25 (Richard A. Epstein et al. eds., 1999).
34. Reed v. Reed, 404 U.S. 71, 76–77 (1971).
35. *See* Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism, and the Dependency Dilemma*, *in* JOINT CUSTODY & SHARED PARENTING 63, 63–87 (Jay Folberg ed., 2d ed. 1991).
36. CHAMALLAS, *supra* note 33, at 24–25.

In liberal feminism, context is nearly irrelevant. Making laws gender neutral and ensuring formal equality is assumed to promote women's equality, regardless of their impact on society.[37] That is, liberal feminists assumed that giving women the same rights as men would translate into women's equality on the ground level.[38] It was difficult for them to contend with biological differences where equal treatment could be disadvantageous to women.[39]

Taking feminism in a new direction, scholars emerging in the 1980s emphasized women's differences from men and proposed that any evaluation of laws and policies should take that fundamental notion into account.[40] Taking their cue from Carol Gilligan's work, cultural feminists found that women's behavioral differences were tied to their sex.[41] Critics of cultural feminism argue that sex "essentializes" women's behavior.[42] While these feminists took into account social context, their thinking was always fixed—all women shared certain traits that were different from those of men.[43]

Anti-subordination legal theorists also emphasized the difference between men and women.[44] Men's and women's different roles and privileges in society contributed to women's inequality.[45] If men and women were not equal in society, then treating them the same in the law would not necessarily promote equality.[46] These scholars believed that gender was socially constructed rather than fixed.[47] According to a prominent anti-subordination theorist, Catharine MacKinnon, women's inequality in society was the result of

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37. *See id.* at 24.
38. *See id.* at 24–25.
39. *Id.* at 26.
40. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215–16 (1989).
41. *See, e.g.*, West, *supra* note 22, at 16–18.
42. Verta Taylor & Leila J. Rupp, *Women's Culture and Lesbian Feminist Activism: A Reconsideration of Cultural Feminism*, 19 SIGNS: J. WOMEN IN CULTURE & SOC'Y 32, 41–42 (1993).
43. *See id.* at 41.
44. *See* Ruth Colker, *The Anti-Subordination Principle: Applications*, 3 WIS. WOMEN'S L.J. 59, 60 (1987).
45. *See e.g.*, Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 15 (1991).
46. Cain, *supra* note 25, at 201.
47. MACKINNON, *supra* note 40, at 113; *see* Jeffrey Brand-Ballard, *Reconstructing MacKinnon: Essentialism, Humanism, Feminism*, 6 S. CAL. REV. L. & WOMEN'S STUD. 89, 96 (1996) (noting that "[o]ne's gender . . . is constituted by the role one is sexually situated to play in society: to be male is to be socially consigned to sexual dominance; to be female is to be socially consigned to sexual subjugation.").

oppression by men, not biology.[48] MacKinnon's approach rejected the idea that men and women should be treated identically.[49] Instead, she believes that in some cases identical treatment can lead to subordination.[50] Anti-subordination theorists would be willing to deviate from formally equal laws if doing so would benefit women in practice.[51]

For MacKinnon, however, even though the impact of laws must be evaluated within context, the context is fixed and unchanging.[52] Her theory is animated by the assumption that every society is defined by male dominance over women.[53] In her view, the legal system was principally designed to perpetuate male dominance over women.[54] Sexual abuse and sexual relationships were the fundamental ways in which women were oppressed.[55] Consequently, under dominance theory, if a policy promotes women's equality in one country's context, then it would be assumed to have the same impact in a different country's context.[56] Thus, the mainline feminist legal theories could not conceive of a practice as contextual—having

48. MACKINNON, *supra* note 40, at 95 ("[W]omen as a group are dominated by men as a group, and therefore as individuals. . . . [W]omen are subordinated in society, not by personal nature or by biology.").

49. *See id.* at 226–27 ("Abstract equality necessarily reinforces the inequalities of the status quo to the extent that it evenly reflects an unequal social arrangement.").

50. *See id.* at 234 ("The mainstream law of equality assumes that society is already fundamentally equal. It gives women legally no more than they already have socially, and little it cannot also give men. Actually doing anything for women under sex equality law is thus stigmatized as special protection or affirmative action rather than simply recognized as nondiscrimination or equality for the first time.").

51. *See, e.g.*, West, *supra* note 22, at 59 (discussing the disparate effects on men and women arising from rape law); *see also* MACKINNON, *supra* note 40, at 241–42 (discussing laws that that "purport to protect women as part of the community," but actually serve to subordinate women).

52. *See* CHAMALLAS, *supra* note 33, at 18 ("The theme of some recent feminist scholarship can be described as 'the more things change, the more they stay the same.'").

53. *See* MACKINNON, *supra* note 40, at 237 (arguing that "[l]iberal legalism is . . . a medium for making male dominance both invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society.").

54. *See* Catharine A. MacKinnon, *Reflection on Sex Equality Under Law*, 100 YALE L.J. 1281, 1282–85 (1991).

55. Deborah Schwenk, Book Review, 12 WOMEN'S RTS. L. REP. 205 (1990) (reviewing MACKINNON, *supra* note 40).

56. It should be noted that context (though not geographic context) was very important to feminist legal methods. In describing the various feminist legal methods, Professor Bartlett discusses context in the following ways: the context of multiple identities, the social context, the factual context of a case, the context of community norms, and the historical context. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 849–51, 854 (1990).

differing impacts on women's equality based on the magnitude of the practice, social norms of inequality within which the practice manifests itself, and other contextual factors.

B. *Context in International Human Rights Law: Universality v. Cultural Relativism*

The debate about whether international human rights should apply universally across cultures and countries or whether they should vary based on culture is age-old.[57] In the early 1990s, this binary frame to human rights also elicited much debate about women's rights.[58] A "strong" cultural relativist would "assert that culture is the sole or primary source of the validity of a practice or claim to a moral right."[59] The supporters of universalism often draw upon natural law and reason and argue that there are objective standards by which to judge human conduct and to create law.[60] Universalism "assumes that there is a law that is so basic, so 'natural,' that it exists in all communities."[61]

Debates emerged between feminists and cultural relativists—"[w]hat feminists view as inequality," a cultural relativist would claim "is actually egalitarianism 'in unfamiliar contexts.'"[62] What Western feminists may consider oppressive, Western cultural relativists may consider cultural preservation.[63] For example, much feminist debate ensued in the 1990s about whether or not the practice of female genital cutting was oppressive to women in Africa.[64]

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57. *See generally* Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984) (discussing the tension between cultural variability in human rights and the universal rights afforded to everyone); John Kleinig, *Cultural Relativism and Human Rights*, *in* TEACHING HUMAN RIGHTS 111 (A. Tay ed., 1981) (reviewing cultural differences throughout history and the effect on universal human rights); Christopher C. Joyner & John C. Dettling, *Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law*, 20 CAL. W. INT'L L.J. 275 (1990) (providing a conceptual analysis of cultural relativism by fleshing out the problems associated with its nature and the relationship between culture and international law); Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1985) (discussing the effects of the universalization of the concern for human dignity as international law responds to the demands for individual freedom, which challenges state practices reflecting geographical and cultural particularities).
58. *See* Kim, *supra* note 14, at 56.
59. *See id.* at 56.
60. *Id.* at 63–64.
61. Kim, *supra* note 14, at 63–64.
62. *Id.* at 61.
63. *Id.*
64. *Id.*

Tracy Higgins, a feminist and international human rights legal scholar, astutely observed the intervention of anti-essentialist feminists in the debates between universalism and cultural relativism in international human rights theory and policy.[65] She notes the parallels in the critiques made by anti-essentialist feminists against mainstream feminism to the critiques made by relativists to universalism:[66]

> Responding to this division, anti-essentialist feminists have attempted to rethink both the various descriptions of gender oppression that have been offered and the assumption that gender oppression can be described meaningfully along a single axis. Instead, they have focused on local, contextualized problems of gender oppression. In this sense, anti-essentialism's criticism of general accounts of women's oppression parallels cultural relativism's critique of universal theories of human rights. Like cultural relativism, feminist anti-essentialism seems to lead to the conclusion that gender inequality cannot be explained cross-culturally.[67]

In observing the challenges in resolving the debate between the universalists and relativists, Professor Higgins points out that:

> Confronted with the challenge of cultural relativism, feminism faces divergent paths, neither of which seems to lead out of the woods of patriarchy. The first path, leading to simple tolerance of cultural difference, is too broad. To follow it would require feminists to ignore pervasive limits on women's freedom in the name of an autonomy that exists for women in theory only. The other path, leading to objective condemnation of cultural practices, is too narrow. To follow it would require feminists to dismiss the culturally distinct experiences of women as false consciousness.[68]

She concluded that, "For feminists, the challenge is simultaneously to reject universalist human rights claims that fail to account for

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65. Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 103 (1996).
66. *Id.* at 102–03.
67. *Id.*
68. *Id.* at 125–26.

difference and to embrace a normative conception of gender justice that is critical of patriarchy across cultures."[69] I heed her warning. My proposal is not a wide-scale rejection of a common notion of gender equality; rather, I argue at the margins for some flexibility.

Moreover, I am asking a different question from those addressed by early feminist debates in international human rights. The question those debates revolved around was whether or not a practice was repressive to women within the context in which it originated.[70] On the other hand, the question I ask in this article is whether or not a practice that is undertaken in a context other than the one in which it originated is oppressive to women.

These two sets of questions have not always been treated separately in international human rights theory.[71] Questions about cross-border practices (i.e., practices brought from one country to another by migrants) have not been distinguished from the questions about whether or not human rights are universal or culturally relative.

Universality has largely won the day in international human rights law and practice.[72] International human rights organizations are reluctant to deviate from the principle of universality, in part, because it gives their positions moral authority.[73] They may also feel uncomfortable taking conflicting positions on the same practice (e.g., that veil bans are permissible in one country, but not in another). Some scholars and advocates may resist deviating from universality as it implies the acceptance of cultural relativism. For all of these reasons, the thrust of international human rights discourse generally has not been amenable to the view that a practice could be a human rights violation in one context, but not in another.

C. *Context in Karima Bennoune's Work*

Professor Karima Bennoune's work pushes against the notion of universality. Focusing on veil bans in Europe, she argues that whether or not veil bans are appropriate depends on the context.[74] She points out that her proposal provides "an innovative contextual

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69. *Id.* at 105.
70. *See, e.g.*, Hilary Charlesworth, *Feminist Critiques of International Law and Their Critics*, 1994–1995 THIRD WORLD LEGAL STUD. 1, 13 (1994).
71. *See supra* notes 10–16 and accompanying text.
72. *See generally* Donnelly, *supra* note 57 (exploring "several different senses of 'universal' human rights").
73. *See id.* at 291.
74. Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*, 45 COLUM. J. TRANSNAT'L L. 367, 371 (2007).

approach to assessing the international legality of bans in public schools on 'modest' garments claimed to be required by religious beliefs for Muslim women."[75] She elaborates that a contextual analysis of bans on modest dress of Muslim women would examine a range of factors:

> [T]he impact of the garments on other women (or girls) in the same environment; coercion of women in the context, including activities of religious extremist organizations; gender discrimination; related violence against women in the location; the motivation of those imposing the restriction; Islamophobia, if relevant, or religious discrimination in the context; the alternatives to restrictions; the possible consequences for human rights both of restrictions and a lack thereof; and whether or not there has been consultation with impacted constituencies (both those impacted by restrictions and by a lack of restrictions on such garments), and, if so, what their views are.[76]

She examines two court decisions—the European Court of Human Rights (ECHR) judgment in *Sahin v. Turkey* (2004)[77] and the British House of Lords judgment in *Begum v. Headteacher*.[78] In *Sahin*, the ECHR held that Turkey's ban on the headscarf in universities did not violate the European Convention on Human Rights' guarantee of religious expression.[79] On the other hand, in *Begum*, the House of Lords upheld a school's ban on the *jilbab*, which is a long cloak covering everything but the head, hands, and feet.[80] While she appears to be open to the possibility that veil bans are impermissible in some countries but not in others, Bennoune finds the bans to be justified in both countries she considered—Turkey and the U.K.[81]

In *Sahin*, the issue before the ECHR was whether the Turkish ban violated a woman's right to free expression under the European Convention of Human Rights ("Convention").[82] Under the

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75. *Id.* at 367.
76. *Id.* at 396.
77. Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. (2004), *aff'd*, App. No. 44774/98, Eur. Ct. H.R. (2005).
78. R v. Headteacher and Governors of Denbigh High School [2006] UKHL 15 (HL) (appeal taken from Eng.).
79. *Sahin*, Eur. Ct. H.R. at 3–4.
80. Bennoune, *supra* note 74, at 410.
81. *See id.* at 414–15.
82. *Sahin*, Eur. Ct. H.R. at 1.

Convention, this right can be limited in order to protect the rights of others.[83] Bennoune asserts that the Turkish ban was appropriate because "[e]ven to the extent that for some women, the choice to wear a headscarf is their own, and is for them an expression of religious belief, this limitation on that choice is necessary in context to protect the rights of others."[84]

She also concludes that the ban in the United Kingdom on the more restrictive clothing was appropriate in a situation where a less restrictive headscarf was still available and where there was evidence that some girls would have felt coerced into wearing the restrictive dress if it were not banned.[85] Bennoune points out that her conclusion that the bans were appropriate in both Turkey and the U.K. cases hinges upon the fact that they were in "public educational institutions, which shape the identities of future generations and forge the public consensus about gender roles and equality."[86]

On the other hand, she argues that while bans in Turkey and the U.K. were appropriate, it would be inappropriate to ban it in the American law school where she teaches because so few women wear them.[87] The magnitude of the practice in the context in which it occurs appears to be an important consideration in determining whether to ban it.[88] Even though she believes both bans in Turkey and the U.K. were appropriate, her contextual approach in evaluating bans leaves open the possibility that in some contexts, veil bans may not be appropriate.[89] Bennoune also briefly discusses France's 2004 law restricting religious dress in schools, but does not draw any conclusions about its legitimacy.[90] She notes that "[t]he French law perches in between as a truly hard case."[91] In Part IV, I discuss France's full-face ban adopted in 2010, three years after the publication of Bennoune's article. I build on Bennoune's approach to veil bans to develop a methodology for evaluating the human rights consequences of veil bans.

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83. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention].
84. Bennoune, *supra* note 74, at 386.
85. *Id.* at 412–13.
86. *Id.* at 386.
87. *Id.* at 389–90.
88. *Id.* at 396.
89. *See id.* at 416.
90. *Id.* at 413–16.
91. *Id.* at 416.

III. TRANSNATIONAL FEMINIST LEGAL APPROACH TO CROSS-BORDER PRACTICES

As described above, American feminist legal theory has generally taken a universal understanding to rights: if a practice is viewed as harmful to women in one country context, it will also be assumed to be harmful to women in another country context.[92] Similarly, under international human rights doctrine, there are two main ways to understand human rights: universal or culturally relative.[93] The principle of universality—that everyone essentially has the same human rights everywhere—has won the day among modern human rights organizations, institutions, and scholarship.[94] Any deviation from universality is thought to be an argument in favor of cultural relativism.[95] Under the extreme version of cultural relativism, human rights gain meaning from religious and cultural values in any given society.[96] Something is considered a human right in any given society only if it is consistent with cultural values.[97]

I argue for a position somewhere between those polar opposites.[98] I propose a transnational feminist legal approach to cross-border practices, which recognizes that a practice can contravene women's equality in one social and country context, but may not have the same impact in another. Some practices change meaning over time and in different social, historical, political, and other contexts.[99] I developed this transnational feminist methodology in greater depth elsewhere[100]

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92. *See* Kim, *supra* note 14, at 49–50.
93. Higgins, *supra* note 65, at 93.
94. Kim, *supra* note 14, at 63–64.
95. *See* Higgins, *supra* note 65, at 91.
96. Kim, *supra* note 14, at 56, 58–59.
97. *See generally* Donnelly, *supra* note 57, at 411 ("Human rights are inherently 'individualistic'; they are rights held by individuals in relation to, even against, the state and society.").
98. *See, e.g.*, Kalantry I, *supra* note 11, at 64–65 (proposing a contextualized feminist approach while discussing the legality of sex-selective abortion); SITAL KALANTRY, WOMEN'S HUMAN RIGHTS AND MIGRATION: SEX-SELECTIVE ABORTION LAWS IN THE UNITED STATES AND INDIA (forthcoming 2017) [hereinafter KALANTRY II].
99. *See, e.g.*, Bartlett, *supra* note 56, at 877–78 ("[T]he postmodern view posits that the realities experienced by the subject are not in any way transcendent or representational, but rather particular and fluctuating, constituted within a complex set of social contexts. Within this position, being human, or female, is strictly a matter of social, historical, and cultural construction.").
100. *See, e.g.*, Kalantry I, *supra* note 11, at 64–65 (proposing a contextuali zed feminist approach while discussing the legality of sex-selective abortion); KALANTRY II, *supra* note 98.

and have examined sex-selective abortion bans through the lens of this framework.[101]

I want to be clear that I am not arguing that all cross-border practices are consistent with women's equality or that none of them should be prohibited. Nor am I arguing that all cross-border practices are morally acceptable. I am simply suggesting that we need to be open to the possibility that a cross-border practice, although harmful to women in one country, may not be oppressive when undertaken in another country.

It is important to make this distinction because, in some cases, bans on a practice that are justified for the sake of promoting women's equality do not necessarily promote equality, but rather only restrict other rights of women.[102] For example, bans on sex-selective abortion burden reproductive rights and bans on veils impinge on free exercise of religion.[103] In weighing costs and benefits of bans on cross-border practices, people in migrant-receiving countries may erroneously overvalue the negative impact of the practice, particularly if they assume that the consequences of the practice are the same in their own country as they are in the country of origin of the immigrant.

American feminist legal theory might suggest that we need only focus on the context where a regulation is being considered (i.e., the migrant-receiving country). On the other hand, international human rights law and theory shines light on the context where the practice first emerged and was first labeled as oppressive to women (i.e., the migrant-sending country).

The insights in the field of transnational law draw attention to the importance of both the migrant-receiving and migrant-sending contexts in evaluating whether a regulation by a migrant-receiving country on immigrant women's behavior will promote equality or contravene it. Transnational law is distinct from international law, which governs the relationships between countries. Transnational law highlights the interactions of domestic laws in the increasingly global web of connections among people, corporations, as well as goods, services, and knowledge. Consequently, a transnational

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101. *See* Kalantry I, *supra* note 11, at 79; KALANTRY II, *supra* note 98. *See generally* Sital Kalantry, *Sex-Selective Abortion Bans: Anti-Immigration or Anti-Abortion?*, 16 GEO. J. INT'L AFF. 140 (2015) (discussing sex selection bans and their perceptions over time).

102. Kalantry I, *supra* note 11, at 78–80.

103. *See id.* at 64; Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 757 (2006).

approach encourages us to focus on multiple contexts in evaluating a ban in one country.

In the migrant-receiving country, researchers and policymakers should examine the gendered nature of social institutions, the historic subjugation and inequality of women, and other factors that give meaning to the practice as discriminatory to women in the migrant-receiving country. Researchers should also investigate the scope and magnitude of the cross-border practice in question.

The migrant-receiving country context should also be examined in detail. Researchers should attempt to determine how widespread the practice is in that country. What are the individual motives for women who undertake it? What societal institutions contribute to giving meaning to the practice as discriminatory?

After understanding the practices in the two contexts (the context where the practice is carried out by migrants and the context where the practice has longer historical roots), I propose a comparative study of these contexts. Do women undertake the practice at the same rate? Do the same social institutions that contribute to the practice exist in the country of destination? What (if any) societal factors present in the migrant-receiving country that give rise to the practice that are in fact not present in the migrant-sending country? Are there different factors in the migrant-receiving country that explain the reasons for the practice? Through this comparative study, we can better determine the human rights impact of the practice in the migrant-receiving countries.

In evaluating bans on cross-border practices, I caution policymakers, feminists, voters, and others from relying too heavily on the context of a foreign country in understanding a practice in their own country even when it is undertaken by migrants from that foreign country. At the same time, the context of the foreign country cannot be ignored. It is important to understand the scope, results, and causes of the same practice in another country and to compare them to the scope, results, and causes of the practice in the migrant-receiving country. By doing this, we are able to determine whether or not the factors that contribute to making a practice oppressive in one context are also present in another country's context.

Additionally, I encourage people in migrant-receiving countries who think otherwise to recognize that culture is not fixed in time and space and that it is not the sole driver for the behavior of immigrants

in their country.[104] Instead, motives for the behavior of immigrants in the country of destination may be different than the motives for the same behaviors in the country of origin of the migrant.[105] Policymakers, feminists, and stakeholders should seek to understand from women who engage in the practice their reasons for doing so. For example, when veil-wearers in France were asked why they wore the veil, some women said they do so as an assertion of their identity in a country where they are a minority, not because they are forced to do it.[106]

Finally, in evaluating restrictions on cross-border practices, policymakers should be open to the possibility that a practice that seems oppressive to women in one country is not oppressive in another country. Failure to consider the contextual nature of cross-border practices means that in the name of promoting gender equality, in some cases migrant-receiving countries are adopting prohibitions that trample on the rights of immigrant women.

In the next section, I demonstrate how policymakers, feminists, and others in France relied on information and their knowledge about the practice of veiling in foreign countries to support a ban on veils that cover a woman's face in France.

IV. DECONTEXTUALIZATION IN THE FULL-FACE VEIL BAN DISCOURSE IN FRANCE

In this section, I describe how behavior, motives, and harms were decontextualized in the debates around the banning of the full-face veil in France. I refer to "decontextualization" as taking information about certain groups of people whose behaviors, motives, and attitudes are shaped by and respond to a certain political, historical, economic, and social context and then transposing that information to another group of people who live in a completely different context.[107] In 2004, France prohibited girls from wearing headscarves in schools.[108] Six years later, in 2010, France banned women from

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104. *See generally* Francine D. Blau, *Immigrants and Gender Roles: Assimilation vs. Culture* (Inst. for the Study of Labor, Discussion Paper No. 9534, 2015), http://ftp.iza.org/dp9534.pdf (discussing the influence of culture on immigrant women's behavior).

105. *See, e.g.*, Kalantry I, *supra* note 11, at 78 (proposing a "country-by-country" approach to sex selection).

106. JOAN WALLACH SCOTT, THE POLITICS OF THE VEIL 137 (Ruth O'Brien ed., 2007).

107. *See infra* Part V.

108. Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of Mar. 15, 2004], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p.

covering their full faces in public spaces.[109] The text of the law did not specifically target Muslims, but it was clear that it was meant to address their veils.[110] The law applies only to full-face coverings and states that "[n]o one may, in public places, wear clothing designed to conceal the face."[111] These bans are largely justified in terms of women's equality.[112]

Some might believe that veil bans are motivated primarily by an animus towards Muslims and that women's equality is merely a secondary concern or a pretext.[113] To these people, women's equality arguments are deployed as a strategy to gain support for the ban.[114] Even if that is true, many people who are not primarily motivated by racial or anti-Muslim bias support the veil ban.[115] In France, many veil-ban advocates truly believe that the veil is oppressive to women.[116] The trouble is that rampant reference to other contexts clouds an accurate understanding of the situation in France.

During the discussions surrounding the veil ban, the perception of the magnitude of the practice was greater than the reality. One of the justifications for the ban was safety: it was necessary to protect the public.[117] The French government argued that veiled women could commit identity fraud by covering their faces.[118] France could only have been concerned about public safety if policymakers thought that people were veiling in great numbers. However, the reality is that

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5190. The House of Representatives has translated this law as follows: "in schools, junior high schools and high schools, signs and dress that conspicuously show the religious affiliation of students are forbidden." H.R. Res. 528, 108th Cong. (2004), https://www.congress.gov/bill/108th-congress/house-resolution/528/text.

109. Jennifer Heider, *Unveiling the Truth Behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights*, 22 IND. INT'L & COMP. L. REV. 93, 93 & n.7 (2012).

110. *Id.* at 95.

111. Loi n° 2010-776 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of 11 October 2010 on the Prohibition on the Concealment of the Face in Public], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344, *translated in* S.A.S. v. France, 2014-III Eur. Ct. H.R. 341, ¶ 74.

112. *See* Heider, *supra* note 109, at 116–17.

113. *See, e.g.*, Bennoune, *supra* note 74, at 394 (justifying veil bans by citing women's rights, when Islamophobia is the real motivation).

114. *See, e.g.*, *id.* ("Some [human rights advocates] seem to be less willing to decry violations of women's human rights, in the Muslim world and Muslim communities, including those that involve pressure to wear 'modest' dress, because of the rise in prejudice against Muslims and Islam.").

115. *See* Heider, *supra* note 109, at 93.

116. S.A.S. v. France, 2014-III Eur. Ct. H.R. 341, ¶ 25.

117. *Id.* ¶ 82.

118. *Id.*

very few women were wearing the full-face veil in France at the time of the ban.

Indeed, a study cited by the European Court of Human Rights found that only 1900 women in France wore the full-face covering.[119] It seems that people who pushed for the law assumed that because women in some Muslim countries wear the veil, many Muslim women living in France may also be veiling.[120] Perhaps this assumption developed in response to a growing Muslim immigrant population in France.[121] Contrary to widespread assumptions, however, empirical studies have found that the face veil is not worn exclusively by recent immigrants.[122] European-born women—women who have lived in Europe most of their lives—and European religious converts both were shown to wear face veils.[123] Alternatively, the rationale could have been symbolic: policymakers wanted to take a stand against a practice they found to be oppressive even though proponents of the practice claimed it was part of their religion.

Eva Brems, a human rights professor at Ghent University, points out that women who wore the veil were rarely consulted about their reasons for wearing it.[124] When the Parliamentary Commission of Inquiry in France evaluated the ban, it "heard about 200 witnesses and experts."[125] The Commission "sent out questionnaires to several French Embassies."[126] But it failed to seek out a single woman who

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119. *Id.* ¶ 145.

120. *See generally id.* ¶ 16 (demonstrating that the belief that a majority of Muslim women in France wear a full-face veil is inaccurate because the veil "was a recent phenomenon in France" and was worn only by an estimated 1,900 women).

121. *See* Adam Taylor, *Map: France's Growing Muslim Population*, WASH. POST (Jan. 9, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/01/09/map-frances-growing-muslim-population/; PEW FORUM ON RELIGION & PUB. LIFE, PEW RESEARCH CTR., THE FUTURE OF THE GLOBAL MUSLIM POPULATION 127, 130 (2011), http://www.pewforum.org/files/2011/01/FutureGlobalMuslimPopulation-WebPDF-Feb10.pdf.

122. Eva Brems, *Introduction to the Volume*, *in* THE EXPERIENCES OF FACE VEIL WEARERS IN EUROPE AND THE LAW 13 (Eva Brems ed., 2014) [hereinafter Brems I].

123. *See id.*; *A Voice Behind the Veil: Planning to Defy a French Law*, TIME, http://content.time.com/time/video/player/0,32068,753330077001_2042878,00.html (last visited Dec. 19, 2016) (interviewing a Muslim woman who was born and raised in France that chose to wear a face veil because of her spirituality).

124. *See* Brems I, *supra* note 122, at 2–3.

125. Eva Brems, *Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings*, 22 J.L. & POL'Y 517, 517–18 (2014) [hereinafter Brems II].

126. *Id.*

actually wore a face veil.[127] The lone exception was one woman, who appeared before the Commission at her own request.[128]

Some people perceive that women in foreign countries are forced or coerced to wear veils.[129] Instead of conducting empirical research about why women veiled in France, some people may have relied on their understanding of the reasons for veiling in foreign countries. Moreover, many scholars have argued against the coercion narrative that prevails about veiling. Saba Mahmood, for example, has pointed out that wearing the veil is empowering to women even in countries where it is common practice.[130] Leila Ahmed's work about the resurgence of the veil also notes that for many women it is voluntary.[131]

The narrative that Muslim women are coerced to wear a veil in Islamic countries is then projected onto Muslim women living in France. According to Joan Scott's work, *The Politics of the Veil*, "two investigative bodies [were] appointed to look into the issue of headscarves in public schools."[132] They found that wearing headscarves was "either . . . a denial of freedom or a loss of reason."[133] Scott notes that, in the French debate, the veil has never been seen as "reasonable choice."[134] While the investigative bodies admitted that "a few (*certains*) girls considered the veil a means of emancipation, the National Assembly study group insisted that many more (*beaucoup*) felt it oppressive."[135] According to psychoanalyst Elisabeth Roudinesco, the veil was thought to be a "curtain" that shrouds young girls in silence.[136] Of course, as Scott points out, there was no actual data to support the claim.[137] The coercion narrative also underlays the 2010 law, which contains a provision punishing people who force a woman to conceal her face.[138] There are probably

127. Brems I, *supra* note 122, at 2–3.
128. Brems II, *supra* note 125, at 517–18.
129. *Id.* at 533.
130. SABA MAHMOOD, POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT 16 (2005).
131. LEILA AHMED, A QUIET REVOLUTION: THE VEIL'S RESURGENCE, FROM THE MIDDLE EAST TO AMERICA 119 (2011).
132. *See* SCOTT, *supra* note 106, at 129.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 132.
137. *Id.* at 129.
138. Law 2010-1192 of Oct. 11 2010, art. 4 (Fr.).

women who wear the face veil due to overt or implicit coercion, but those situations are overstated in the debates.[139]

The coercion narrative prevailed in France despite the fact that many Muslim women argued that they wore the veil because of "individual choice and not community pressure."[140] Women who wore the veil in France also pointed out that they wore it for different reasons than women in Muslim-majority countries.[141] In interviews, girls said they wore veils as an expression of self-identity in a country where they are a minority.[142] Some women wore the veil precisely because it was used to discriminate against Muslims in France.[143] By embracing a symbol that was used to discriminate against them, they lessened the power of its oppression.[144] It should be noted that not all Muslim women oppose the ban.[145] Some French Muslim women's rights activists agree that the veil is "a tool of oppression, alienation, discrimination, and an instrument of men's power over women."[146]

Unlike countries where the veil is required by law or by social pressure, women in France are exposed to the view that the veil is contrary to gender equality.[147] While in some countries there may be societal pressure to veil, in France the mainstream societal pressure is the opposite.[148] The only pressure to veil (if at all) in France would be from family, relatives, and other friends with the same beliefs.[149] Although this pressure can be significant, it is not the same as the pressure to conform to societal norms in countries where veiling is widespread.

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139. SCOTT, *supra* note 106, at 131.
140. *Id.* at 135.
141. *See id.* at 136–37.
142. *See id.* at 137.
143. *See id.* at 138–39.
144. *See id.* at 139.
145. *See id.* at 14.
146. Bennoune, *supra* note 74, at 391 (quoting FADELA AMARA, BREAKING THE SILENCE: FRENCH WOMEN'S VOICES FROM THE GHETTO 100 (Helen Harden Chenut trans., Univ. Cal. Press, 2006) (2003)).
147. *See* SCOTT, *supra* note 106, at 153–54.
148. *See Widespread Support for Banning Full Islamic Veil in Western Europe*, PEW RES. CTR. (July 8, 2010), http://www.pewglobal.org/2010/07/08/widespread-support-for-banning-full-islamic-veil-in-western-europe/.
149. *See generally* Kim Willsher, *French Muslim Women on Burqa Ban Ruling: 'All I Want Is to Live in Peace,'* GUARDIAN (July 1, 2014, 2:26 PM), https://www.theguardian.com/world/2014/jul/01/french-muslim-women-burqa-ban-ruling ("[S]he had suffered 'absolutely no pressure' from her family or relatives to wear the burqa and was prepared to uncover her face for identity checks, but insisted on the right to wear the veil.").

Moreover, in many other countries, such as Iran, women are required to wear some form of veil by law.[150] By comparing the French situation to those countries, we are not able to clearly understand the reasons women in France veil. It is fair to say that a law that makes the veil mandatory is coercive. But it is problematic to assume that it is coercive in France just because of the context countries.

Many argued that women who claimed to veil voluntarily were under a "false consciousness" or duped by their own religion.[151] The Constitutional Court of Belgium's decision in upholding the veil ban in Belgium exemplifies this position:

> Even where the wearing of the full-face veil is the result of a *deliberate choice on the part of the woman*, the principle of gender equality, which the legislature has rightly regarded as a fundamental value of democratic society, justifies the opposition by the State, in the public sphere, to the manifestation of a religious conviction by conduct that cannot be reconciled with this principle of gender equality. . . . [T]he wearing of a full-face veil deprives women – to whom this requirement is solely applicable – of a fundamental element of their individuality which is indispensable for living in society and for the establishment of social contacts.[152]

The court argued that even in respect of women who chose to veil themselves, they were denying themselves gender equality.[153] By this argument, the court imposed its version of gender equality on all

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150. Ramin Mostaghim, *Protest over Islamic Dress Code Clogs Tehran Streets*, L.A. TIMES (May 7, 2014, 1:00 PM), http://www.latimes.com/world/middleeast/la-fg-iran-dress-code-protest-20140507-story.html; Swati Sharma, *MAP: Where Islamic Veils Are Banned – and Where They Are Mandatory*, WASH. POST (July 1, 2014), https://www.washingtonpost.com/news/worldviews/wp/2014/07/01/map-where-islamic-veils-are-banned-and-where-they-are-mandatory/.

151. *See* William Langley, *France's Burka Ban is a Victory for Tolerance*, TELEGRAPH (Oct. 21, 2014, 7:30 AM), http://www.telegraph.co.uk/news/worldnews/europe/france/8444177/BurkaFranceNational-FrontMarine-Le-PenMuslimFadela-AmaraAndre-Gerinhijab.html; *Daniel Weinstock - Feminism, the Veil, and the Problem of False Consciousness (ASI 2014)*, MCGILL: BLOGS (July 18, 2014, 8:42 PM), http://blogs.mcgill.ca/tcpsych/2014/07/18/daniel-weinstock-feminism-the-veil-and-the-problem-of-false-consciousness-asi-2014/.

152. S.A.S. v. France, 2014-III Eur. Ct. H.R. 341, ¶ 42 (emphasis added).

153. *See id.*

women and disregarded women's decisions about their competing priorities (e.g., the right to religion, right to identity, gender equality, etc.) that are at stake in the decision to wear the veil.[154]

The idea that Muslim women who veil themselves have no agency was recently articulated by Laurence Rossignol, the French minister of women's rights, in a controversy around women's fashion.[155] Objecting to designer labels that have begun to create modest dress for women, including fashion styles that cover a woman's hair, Ms. Rossignol argued that "[w]hen brands invest in this Islamic garment market, they are shirking their responsibilities and are promoting women's bodies being locked up."[156] She then compared Muslim women to "consenting slaves," but later recanted that part of her statement.[157] As noted above, after the brutal massacre by a terrorist in Nice, France, many French cities have begun to ban modest swimwear that Muslim women wear, known as the "burkini."[158]

In addition to ascribing motives based on their understanding in foreign countries, some people in France also assumed that the consequences of allowing women to veil in France would be similar to those in foreign countries.[159] Caroline Fourest, a leading supporter of the headscarf ban in schools, insists that "Islamists were engaged in a political conspiracy the aim of which was the oppression of women and the elimination of secularism—in short, that the experience of Iran was about to be imported into France."[160] The claim, therefore, was that the veil was part of the oppression of women in Iran and that oppression would be replicated in France.[161] In this section, I have shown how perceptions about why women veil in other countries (which themselves were sometimes inaccurate) were used to further bans on veiling in France. With the emphasis on

154. *See* Saïla Ouald Chaib, *Belgian Constitutional Court Says Ban on Face Coverings Does Not Violate Human Rights*, STRASBOURG OBSERVERS (Dec. 14, 2012), https://strasbourgobservers.com/2012/12/14/belgian-constitutional-court-ban-on-face-coverings-does-not-violate-human-rights/.

155. Richard Hartley-Parkinson, *French Minister Compares Muslims Who Wear Veils to 'Negroes Who Supported Slavery,'* METRO (Mar. 31, 2016, 8:35 AM), http://metro.co.uk/2016/03/31/french-minister-compares-muslims-who-wear-veils-to-negroes-who-supported-slavery-5785783/.

156. *Id.*

157. *Id.*

158. Katie Mettler, *Burkini Beach Brawl Leads Third French City in a Week to Ban the Swimsuit for Muslim Women*, WASH. POST (Aug. 16, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/08/16/burkini-beach-brawl-leads-third-french-city-in-a-week-to-ban-the-swimsuit-for-muslim-women/.

159. SCOTT, *supra* note 106, at 176.

160. *Id.* at 175–76.

161. *Id.* at 176.

how the veil may be used as a tool of oppression by some governments, the voices of women in France who claim the veil as an expression of religion and identity were sidelined. In the next section, I discuss how the European Court of Human Rights opinion upholding France's full-face veil ban relied on its decision about a veil ban in a Muslim-majority country.

V. DECONTEXTUALIZATION AND THE EUROPEAN COURT OF HUMAN RIGHTS DECISION ON FRANCE'S FULL-FACE VEIL BAN

The European Court of Human Rights (ECHR or court) reviews petitions brought by individuals against countries that are signatories to the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) alleging violations under the Convention.[162] In 2011, a French woman brought a petition to the ECHR arguing that France's full-face veil ban discussed above violates a number of provisions of the Convention.[163] The main claim the ECHR opinion focused on was whether the French veil ban violates a woman's right to express her religious views.[164] I demonstrate how the court referred to a case from another context (Turkey) in justifying its decision to uphold the French veil ban.[165] I argue that it relied too heavily on justifications for a veil ban in another context in making a decision to uphold the ban in France.

Article 9 of the Convention states that everyone has the "[f]reedom to manifest one's religion or beliefs."[166] The ECHR agreed that the petitioner was indeed exercising her religious beliefs when she chose to wear the veil (which she noted she did only occasionally).[167] But this right is not without limit in the Convention. The exercise of one's religion can be limited by the state if "necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[168] France offered a number of reasons for the limitation, including a public safety

162. *European Court of Human Rights (ECtHR)*, COUNCIL EUR., http://www.coe.int/t/democracy/migration/bodies/echr_en.asp (last visited Dec. 19, 2016).
163. S.A.S. v. France, 2014-III Eur. Ct. H.R. 341, ¶¶ 1, 3.
164. *Id.* ¶¶ 74, 107–62.
165. *See id.* ¶¶ 135–39, 151.
166. Convention, *supra* note 83, at art. 9(2).
167. *See S.A.S.*, 2014-III Eur. Ct. H.R. ¶¶ 56–58.
168. Convention, *supra* note 83, at art. 8(2).

rationale.[169] The court rejected the public safety rationale because it found that the state could simply require women to remove their coverings when needed to verify their identities and that there was no other general public safety threat being caused by women wearing veils.[170]

The court also rejected gender equality as an appropriate reason to limit exercise of religious liberty because the petitioner who was asking for the right to veil was a woman.[171] The court noted that "[France] cannot invoke gender equality in order to ban a practice that is defended by women—such as the applicant."[172] In rejecting gender equality as a rationale, the court avoided the objectionable presumption that women who veil do so because they are duped or have a "false consciousness."[173]

But the court did find one justification offered by France to be persuasive. It found that wearing the veil contravenes the notion of "living together."[174] The court stated:

> [It] takes into account the respondent State's point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.[175]

The court further pointed out that: "From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society."[176]

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169. *S.A.S.*, 2014-III Eur. Ct. H.R. ¶¶ 81–82.
170. *Id.* ¶ 139.
171. *Id.* ¶ 119.
172. *Id.*
173. *See id.*
174. *Id.* ¶ 122.
175. *Id.*
176. *Id.* ¶ 153.

The court reasoned that although wearing the face veil was a valid exercise of the freedom of religion guaranteed under the Convention, the veil prevented people in France from living together.[177] It further found that "living together" was an element of the "protection of the rights and freedoms of others," which is a valid reason under the Convention for a state to limit a person's exercise of religion.[178] The court allowed for restrictions on religious freedom even if, in exercising his or her religious freedom, a person infringes upon others' rights by creating barriers to interactions between people.[179]

The dissent was quick to point out that "[t]he very general concept of 'living together' does not fall directly under any of the rights and [guarantees] . . . within the Convention."[180] Eva Brems is even more pointed—she correctly argues that there is no legal right to "see the face of others in a public space."[181] She further points out that in her empirical study she found that veil-wearers reported to have significant public exchanges and connections.[182] She reports that many women she interviewed expressed a self-image that included them as open or sociable persons.[183] The women felt communication was possible even when wearing a full-face veil.[184] The idea of equating social exchange with "face-to-face" interactions is a Western cultural notion.[185]

The court essentially found that the concept, "living together," which does not even rise to the level of a right, trumps another person's fundamental right to religious expression.[186] Upon finding that limiting the religious exercise of face veil wearers was permissible under the Convention, the court then gave wide latitude and deference to France's interpretation by using a doctrine called "margin of appreciation."[187] This doctrine gives countries great discretion in adopting laws in "grey areas" where there is not a clear contravention of the Convention.[188]

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177. *Id.* ¶¶ 125–27.
178. *Id.* ¶ 157.
179. *Id.* ¶¶ 140–42.
180. *Id.* ¶ 5 (Nußberger & Jäderblom, JJ., dissenting).
181. Brems II, *supra* note 125, at 536.
182. *Id.* at 538–40.
183. *Id.* at 539.
184. *Id.*
185. *See id.* at 537 & n.76.
186. *See* S.A.S. v. France, 2014-III Eur. Ct. H.R. 341, ¶ 43.
187. *Id.* ¶¶ 155, 161.
188. *Id.* ¶ 129.

However, in this balancing of rights, it does not seem appropriate to deny someone her right to religion (which is an established fundamental and human right in most jurisdictions, including under the European Convention on Human Rights) in favor of others who feel they are not able to "live together" with someone who is covering her face. The court accepted a weak justification for the law. It may have done so because it agrees that full-face veil bans promote women's equality. However, it may not have wanted to explicitly articulate that position because then it would be implying the woman who was challenging the veil ban was under a "false consciousness" or duped by her religion.[189]

In holding in favor of France, the court refused to follow other commentators who noted that the veil ban contravened the Convention.[190] For example, it rejected the viewpoint of the Commissioner for Human Rights of the Council of Europe that "[p]rohibition of the burqa and the niqab will not liberate oppressed women, but might instead lead to their further exclusion and alienation in European societies."[191] The court also refused to follow the Supreme Court of Spain, which found a veil ban unconstitutional because of the voluntary nature of the full-face veil.[192] In that case, the Spanish court found that it was not possible to restrict a constitutional freedom based on the mere supposition that women who wore veils did so under duress.[193] The Spanish court concluded that the limitations in question could not be regarded as necessary in a democratic society.[194]

Lastly, the court that adjudicated the French full-face veil ban paid no heed to academic legal writings that cautioned that a ban on the wearing of the full-face veil would result in isolating the same women it was meant to protect, and it would "[t]hus be incompatible with the objective of ensuring the social integration of groups of immigrant origin."[195]

In justifying its decision, the court cited *Sahin v. Turkey*, in which the ECHR found that Turkey's law banning headscarves in

189. *See generally id.* ¶¶ 24–25 (concluding that the criminalization of a full-face veil interfered impermissibly with the "aim of protecting the idea of 'living together'").
190. SAS v. France, 2014-III Eur. Ct. H.R. 341 ¶ 106–07.
191. *Id.* ¶ 37 (quoting Thomas Hammarberg, *Human Rights in Europe: No Ground for Complacency,* Counsel of Europe Commissioner for Human Rights 39 (Aug. 3, 2010), http://www.coe.int/t/commissioner/source/prems/HR-Europe-no-grounds-complacency_en.pdf).
192. *Id.* ¶ 46–47.
193. *Id.* ¶ 137.
194. *Id.* ¶ 139.
195. *Id.* ¶ 47.

universities did not violate the Convention.[196] Unlike most domestic courts, the ECHR is not bound by its prior decisions (i.e., they have no precedential value).[197] However, in an empirical study of ECHR decisions, Yonatan Lupu and Erik Voeten argued that the ECHR uses prior decisions much in the same way as U.S. courts as well as other common law courts do.[198] Moreover, even though it cites prior decisions, the ECHR does so without consideration of the country's context.[199]

The court cited *Sahin* seventeen times in its decision on the French veil ban.[200] Each time the court referred to *Sahin*, it was for propositions that ultimately supported its legal conclusion in favor of France.[201] For example, in citing *Sahin* as well as other cases, the court notes that "[i]n democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."[202] The court again cites *Sahin* to support the view that restrictions on religious garb do not violate Article 9 of the Convention.[203]

Moreover, even though the court extensively referred to *Sahin* in the opinion in which it held the French veil ban did not violate the Convention, it did not once distinguish the political and social context of Turkey from that of France.[204] Its failure to specifically articulate the differences between the French context and the Turkish context is even more surprising given that the court specifically noted in its opinion that context matters in adjudicating bans on behavior in the name of women's rights.[205]

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196. *Id.* ¶ 130 (quoting Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. ¶ 122–23 (2004), *aff'd*, App. No. 44774/98, Eur. Ct. H.R. (2005)).
197. *But see* Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRIT. J. POL. SCI. 413, 413 (2012).
198. *See id.* at 413–14.
199. *Id.* at 413, 433.
200. *S.A.S.*, 2014-III Eur. Ct. H.R. ¶ 114, 119, 124–33.
201. *Id.*
202. *Id.* ¶ 126 (citing Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. ¶ 106 (2004), *aff'd*, App. No. 44774/98, Eur. Ct. H.R. (2005)).
203. *Id.* ¶ 133 (citing *Sahin*, App. No. 44774/98, Eur. Ct. H.R. ¶ 109–10).
204. *Id.* ¶ 114, 119, 124–131, 133.
205. *Id.* ¶ 130 ("It observed that the rules in this sphere would consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. It concluded from this that the choice of the extent and form of such rules must

In *Sahin*, the ECHR found that Turkey's ban of headscarves only in universities was necessary to protect the "rights and freedoms of others" and the "protecting [of] public order."[206] The court agreed that "[i]mposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated[], this religious symbol has taken on political significance in Turkey in recent years."[207]

Although the ECHR failed to mention it, the circumstances in the *Sahin* case are clearly distinguishable from those in the French full-face veil ban case.[208] The court in *Sahin* justified its holding on the ground that there was evidence that the pressure to veil was in fact coming from a rising radical interpretation of Islam.[209] Perhaps the veil was being used as a way to maintain and perpetuate inequality.[210] Some commentators have also argued that the reason that the *Sahin* court allowed the Turkish veil ban was because the veil was being used as a symbol for the radical Islam that was gaining hold in Turkey.[211]

Karima Bennoune argues that the Turkish ban was appropriate because "[e]ven to the extent that for some women, the choice to wear a headscarf is their own, and is for them an expression of religious belief, this limitation on that choice is necessary in context to protect the rights of others."[212] In particular, she notes that "[n]on-wearers of such garb risk becoming outsiders, seen as not fully or equally Muslim."[213] She goes on to say that bans are appropriate in public educational institutions because those institutions shape the identities of future generations and forge the public consensus about gender roles and equality.[214]

However, none of these rationales apply in France. The veil is not part of a political discourse between two competing Islamic political

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inevitably be left up to a point to the State concerned, as it would depend on the specific domestic context.") (citing *Sahin*, App. No. 44774/98, Eur. Ct. H.R. ¶ 109)).

206. *Sahin*, App. No. 44774/98, Eur. Ct. H.R. ¶ 99.

207. *Id.* ¶ 115.

208. *See supra* notes 206–07 and accompanying text; *infra* notes 209–19 and accompanying text.

209. *See Sahin*, App. No. 44774/98, Eur. Ct. H.R. ¶ 115.

210. *See id.* ¶ 11 (Tulkens, J., dissenting).

211. Jacco Bomhoff, *Leyla Sahin v. Turkey: ECHR Grand Chamber Judgment*, COMP. L. BLOG (Nov. 11, 2005, 1:36 PM), http://comparativelawblog.blogspot.com/2005/11/leyla-sahin-v-turkey-echr-grand.html.

212. Bennoune, *supra* note 74, at 386.

213. *Id.* at 387.

214. *Id.* at 386.

groups.[215] In France, the ban applies in all public places and is not just limited to schools.[216] Yet, while the court relied heavily on *Sahin*, it failed to appropriately distinguish the context of the Turkish ban from the context of the French ban.[217] In addition, where there is societal, political, or religious pressure to veil (as in Turkey according to the *Sahin* court), it would seem appropriate for a government to desire to counter that pressure for the sake of promoting gender equality.[218] On the other hand, because so few women in France wear the full-face veil or any veil, the dress of a certain group of women would not lead other women in French society to start veiling themselves, nor is veiling part of the mainstream culture.[219] It should be noted that the ban in *Sahin* involved headscarves, whereas France banned women from covering their face. While this distinction could have been relevant, it was not raised by the court in upholding the French full-face veil ban.

The court, by relying on the *Sahin* decision in adjudicating a case arising in France, inaccurately tilted the equation towards upholding the ban.[220] Too much emphasis is placed on one version of gender equality. Furthermore, by relying on the rationale in *Sahin*, the court placed too little emphasis on other motives a woman may have to veil in country where she is a member of a minority religion.[221]

By making the comparison to Turkey, the court inadvertently suggested that the impact of a ban in Turkey would have the same benefits (e.g., promoting women's equality with men) as a ban in France.[222] By its focus on a case arising in Turkey, the court also failed to give weight to the negative consequences the ban would have in France's specific political and social context (e.g., repressing minority immigrant women who wish to express their religion as distinct from the mainstream secular views).[223]

It makes sense that the ECHR should not be bound by its prior decisions because it adjudicates cases across many different countries

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215. *Compare id.* at 379 (noting the fears of the secularist Turkish government over rising religious fundamentalism), *with id.* at 414 (noting that the French ban was primarily motivated by the intent to preserve strict separation between church and state).
216. S.A.S. v. France, 2014-III Eur. Ct. H.R. 341, ¶ 74.
217. *See supra* notes 204–11 and accompanying text.
218. Bennoune, *supra* note 74, at 389–90.
219. *Id.* at 389, 395.
220. *Id.* at 390–92.
221. *See S.A.S.*, 2014-III Eur. Ct. H.R. ¶ 130; *see also* Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. ¶ 10 (2004), *aff'd*, App. No. 44774/98, Eur. Ct. H.R. (2005) (Tulkins, J., dissenting).
222. *See S.A.S.*, 2014-III Eur. Ct. H.R. ¶ 130, 135.
223. *See id.*; *supra* note 212 and accompanying text.

and contexts.[224] Depending on the larger social, historical, and economic contexts, the court may come out one way in a case from one country and reach the opposite conclusion in a case from another country with a similar set of facts.[225] However, it did not do this in *S.A.S. v. France*; instead the court justifies its legal conclusion by referring to the *Sahin* case, which involved a ban on headscarves by Turkey in educational institutions.[226] While upholding the ban in Turkey may have been perfectly appropriate to further gender equality, it should have had little bearing on whether or not a veil ban would promote gender equality in France.[227] The court's reliance on the Turkish decision suggests that it failed to appreciate how context is so crucial in determining whether or not a behavior contravenes gender equality or women's rights.[228]

VI. TOWARDS A TRANSNATIONAL FEMINIST APPROACH TO BANS ON WEARING VEILS

Although the type of in-depth analysis necessary to draw a conclusion about the women's rights implications of a veil ban in France is beyond the scope of this article, I make preliminary observations about how a transnational feminist methodology could be deployed to evaluate the French veil ban as well as veil bans in other migrant-receiving countries.

In evaluating a ban on veils in a migrant-receiving country, policymakers should not decontextualize. That is, they should avoid using information about practices from one country to evaluate laws in their own country. In Part III, I pointed out the ways in which the discussions about the veil ban in France decontextualized.[229] I also explained how, in evaluating the veil bans, the ECHR was not sufficiently sensitive to the fact that a veil ban may promote women's equality in one country, but may have a different result in another country.[230]

Legislatures, unlike courts, do not articulate the competing rights that are at stake in adopting policies, nor do they explain how they

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224. European Court of Human Rights, COUNCIL OF EUR., http://www.coe.int/t/democracy/migration/bodies/echr_en.asp (last visited Dec. 19, 2016).
225. Heider, *supra* note 109, at 105.
226. *See S.A.S.*, 2014-III Eur. Ct. H.R. ¶ 130.
227. Heider, *supra* note 109, at 105.
228. Cochav Elkayam-Levy, *Women's Rights and Religion - The Missing Element in Jurisprudence of the European Court of Human Rights*, 35 U. PA. J. INT'L L. 1175, 1189–90, 1192 (2014).
229. *See supra* Part IV and accompanying text.
230. *See supra* Part V and accompanying text.

have reconciled those competing rights.[231] French policymakers may have thought that the benefits of the ban are that it advances women's equality by prohibiting a practice that they believe to be rooted in and causes gender oppression.[232] Those perceived benefits then outweighed the costs of the ban, which was the prohibition on exercising religious beliefs.[233]

By decontextualizing, policymakers and voters have overvalued the benefits of the ban in France.[234] In countries that require the veil by law—and even in countries that do not require it by law, but still punish uncovered women (e.g., there have been reports of Taliban members using sticks to beat parts of women's bodies that are exposed)—wearing the veil impinges on women's equality rights because women have no choice but to wear it.[235] Thus, in these countries, banning it may enhance gender equality.[236] However, this does not mean that the veil is oppressive to women who wear it in countries such as France, where wearing a veil is not required to be worn by law. Nevertheless, the harms that ensue from mandatory veiling in other countries were transposed to discussions about legislation in France.[237] Therefore, the perceived benefits from banning the veil were greater than the actual benefits in France.

Relatedly, the costs associated with adopting the ban were undervalued. Because many supporters of the ban decontextualized

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231. *The Right to Reasoned Decisions*, B. TRIBUNALS & ADJUDICATION SERV., http://www.tbtas.org.uk/policies-guidance-and-publications/newsletters/the-right-to-reasoned-decisions (last visited Dec. 19, 2016); *see Member State Law - France*, EUR. JUST., https://e-justice.europa.eu/content_member_state_law-6-fr-en.do?member=1 (last visited Dec. 19, 2016).

232. *See* Anne Roberts, Veiled Politics: Legitimating the Burqa Ban in the French Press (Dec. 14, 2011) (unpublished thesis, Georgia State University) (on file with http://scholarworks.gsu.edu/communication_theses/78).

233. *Id.* at 17–19.

234. *See* Jake Cigainero, *Five Years into Ban, Burqa Divide Widens in France*, DW (Oct. 4, 2016), http://www.dw.com/en/five-years-into-ban-burqa-divide-widens-in-france/a-19177275.

235. *See Women in Afghanistan: The Back Story,* AMNESTY INT'L (Oct. 25, 2013, 3:20 PM), http://www.amnesty.org.uk/womens-rights-afghanistan-history#.VbkuUfN_Oko.

236. *See* Sital Kalantry, *Does a Ban on Wearing the Full Veil Promote Women's Equality? An Analysis of the European Court of Human Rights Decision*, INTLAWGRRLS BLOG (July 9, 2014) [hereinafter Kalantry III], https://ilg2.org/2014/07/09/does-a-ban-on-wearing-the-full-veil-promote-womens-equality-an-analysis-of-the-european-court-of-human-rights-decision/ ("When discussing the question of whether or not the veil ban promotes women's equality, it is important to take the country context into account.").

237. *The Islamic Veil Across Europe*, BBC (July 1, 2014), http://www.bbc.com/news/world-europe-13038095.

behavior, they thought that women who wore the veil were coerced and those who claimed to wear it voluntarily were "duped" by their religion.[238] By decontextualizing motives, supporters of the ban refused to accept Muslim women's claims that the veil was an expression of their religious identity.[239] Thus, religious freedom and other motives for veiling in France were undervalued.[240] By contextualizing the ban, migrant-receiving countries and courts would make better policy decisions. They would resist the tendency to overvalue the benefits and undervalue the costs of bans on women's behavior.

Instead of decontextualizing, policymakers and researchers should study the context of the migrant-receiving country. Using empirical quantitative and qualitative methods, they should assess the scope of full-face veiling in France, the reasons it is undertaken, and should take seriously the reasons offered by the women who wear full-face veils. Only through an in-depth study will a clear picture about the cross-border practice emerge.

While decontextualization should be resisted, this does not mean that the context where the practice first emerged is not relevant. The practice of veiling is part of a traditional practice in several countries in the world. Information about human rights violations travels quickly across the globe, but this information is often filtered through sound bites and stereotypes. Researchers could study one or more countries where veiling initially emerged to understand whether (and why) it is considered discriminatory or oppressive to women in that country. What is its scope? What are the relevant social and political institutions that give meaning to it as discriminatory?

Once the practice is understood in these multiple contexts, a comparative approach would help focus on factors that explain why a practice may be discriminatory or problematic in one context, but not in another. For example, if social custom or pressure exists in one country, then a ban on the practice may be more appropriate in that country than it would be where the mainstream social mores do not favor (or oppose) the practice.

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238. Ruth Harris, *Why France is Banning the Veil*, PROSPECT (July 14, 2010), http://www.prospectmagazine.co.uk/magazine/why-france-is-banning-the-veil.

239. *See The Islamic Veil Across Europe*, *supra* note 237 ("The European Court of Human Rights upheld the ban on 2 July 2014 after a case was brought by a 24-year-old French woman who argued that the ban violated her freedom of religion and expression.").

240. *See France: Headscarf Ban Violates Religious Freedom*, HUM. RTS. WATCH (Feb. 26, 2004, 7:00 PM), https://www.hrw.org/news/2004/02/26/france-headscarf-ban-violates-religious-freedom.

A transnational feminist approach to veil bans suggests that courts, policymakers, and feminists should be open to the possibility that a veil ban promotes equality in some contexts and not in others.[241] In one country, the veil may be a tool of political and gender repression; in another country, it may be an assertion of religious identity of a minority.[242] Karima Bennoune also suggests that veil bans should be evaluated within the context in which they emerge.[243] However, in the two countries she examined, she felt veil bans were justified.[244]

The idea that a practice is contrary to human rights in one context and not in another defies the dominant paradigm of the universality of rights. Many feminists and human rights advocates assert that veiling is oppressive no matter where the practice emerges.[245] Others believe that bans violate women's rights no matter what country adopts them.[246] For example, Amnesty International objected to the ECHR's failure to find that France's full-face ban violated the European Convention of Human Rights and also objected when that same court failed to hold that Turkey's ban on headscarves in universities violated that Convention.[247]

However, consider the most extreme case where a country requires women to wear some form of veil by law and the practice has historically been used as tool of oppression. If that country passed a law prohibiting women from wearing any veil, few would decry the new law as a contravention of women's equality. Some women in that country might argue that the new ban violates their religious rights, but the government would have a strong argument that its veil ban is part of a larger strategy to combat structural inequality in society. In a country where few women wear the veil, it is less plausible that a ban could be appropriate to promote women's

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241. *See* Kalantry III, *supra* note 236 ("Even if we assume that the full veil is repressive to women in certain countries, when that practice is imported into another country by immigrants, its significance changes.").

242. *See* Amina Haleem, *Covernance: Feminist Theory, the Islamic Veil, and the Strasbourg Court's Jurisprudence on Religious Dress-Appearance Restrictions*, 5 DEPAUL J. WOMEN, GENDER & L. 1, 10–16 (2015).

243. Bennoune, *supra* note 74, at 396.

244. *Id.* at 371.

245. *See* Haleem, *supra* note 242, at 11–12.

246. *See* Brems II, *supra* note 125, at 522–23.

247. *European Court Ruling on Full-Face Veils Punishes Women for Expressing Their Beliefs*, AMNESTY INT'L (July 1, 2014, 12:00 AM), https://www.amnesty.org/en/latest/news/2014/07/european-court-ruling-full-face-veils-punishes-women-expressing-their-religion/; *see Bans on Full Face Veils Would* Violate International *Human Rights Laws*, AMNESTY INT'L (2010), www.amnestymena.org/en/magazine/issue16/Hijab.aspx?articleID=1021.

rights.[248] A migrant-receiving country might argue that its ban promotes the rights of women who would otherwise wear a veil, but that argument ignores those same women's rights to assert their religious identity.

VII. CONCLUSION

Lawmakers in migrant-receiving countries sometimes enact regulations on immigrant women's behavior based on perceptions that the practice is discriminatory to women in foreign countries.[249] Often this perception about the foreign country itself is distorted.[250] They also fail to appreciate that the impact of the practice could change when it is transposed to another country.[251] I have shown here how some supporters of the face-veil ban in France justified it, in part, because the veil is seen as a tool of oppression in other parts of the world.[252] The transnational feminist perspective calls for recognizing and resisting these decontextualized views.[253] It also recognizes that practices change meaning with context—a practice that is oppressive or discriminatory to women in one context is not necessarily oppressive or discriminatory in another context. Finally, it calls for an in-depth understanding and comparison of the practice in multiple contexts.

Global migration continues unabated.[254] The transplantation of people from one country to another has given rise to hotly contested questions about women's human rights. Veil bans, as well as other bans, are being considered and debated in migrant-receiving countries around the world.[255] Canada, for example, recently banned the full-face veil in citizenship ceremonies.[256] Bans on cross-border

248. *See* Bennoune, *supra* note 74, at 396.
249. *See supra* note 6 and accompanying text.
250. *See supra* notes 130–32 and accompanying text.
251. *See supra* notes 142–45 and accompanying text.
252. *See supra* text accompanying notes 160–62.
253. *See supra* note 101 and accompanying text.
254. *See* POPULATION DIV., U.N. DEP'T ECON. & SOC. AFFAIRS, POPULATION FACTS NO. 2013/2 (2013), http://esa.un.org/unmigration/documents/the_number_of_international_migrants.pdf. The UN Department of Economic and Social Affairs estimates that in 2013 the number of international migrants reached 232 million, up from 175 million in 2000. *Id.*
255. *See* Juhie Bhatia, *Overturn of Canada's Niqab Ban Reignites Controversy*, WOMEN'S ENEWS (Sept. 25, 2015), http://womensenews.org/2015/09/overturn-of-canadas-niqab-ban-reignites-controversy/.
256. The ban was overturned in early 2015 but continued to be a hotly debated issue leading up to the October 19, 2015 federal elections. Peter Zimonjic & Rosemary Barton, *Jason Kenney Exit Interview*, CBC NEWS (Sept. 20, 2016, 5:38 PM), http://www.cbc.ca/news/politics/jason-kenney-exit-interview-1.3771320.

practices will continue to be discussed around the world. The "burkini" ban mentioned in the introduction is only one such example.[257]

While there was little world reaction against France's full-face veil ban imposed in 2010, world opinion railed against the burkini bans.[258] While French courts as well as the ECHR upheld the full-face veil ban, France's highest administrative court has rejected the burkini bans.[259] Perhaps the negative reaction towards the burkini bans may be because they were seen as a direct and unfair reaction to the terrorist attacks in France.[260] The global denunciation of the burkini bans and the relative silence in reaction to the full-face veil ban may also have to do with the differences between the garments.[261] The burkini does not cover the face, and there are numerous fashionable iterations of it (some include colors other than black). Additionally, many versions of the burkini are form-fitting, and it covers only a woman's body and hair.[262]

On the other hand, a full-face veil covers a woman's face (except her eyes), is black in color, and often associated with a loose, black blanket-like covering over the body (known as a "burqa").[263] Another salient reason for the contrast in the reactions to the two bans is that the full-face veil is a traditional piece of clothing associated with oppression against women in some countries, unlike the burkini, which was invented in 2004 by an Australian designer.[264] In this article, I have shown that policymakers, feminists, and stakeholders erroneously overemphasize the context of foreign countries when regulating immigrant behavior in their own country. Instead, I propose a transnational feminist methodology that provides a more

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257. *See supra* notes 1–6 and accompanying text.
258. Joseph V. Micallef, *Is France Right to Ban the Burkini?*, WORLDPOST (Sept. 3, 2016, 9:46 AM), http://www.huffingtonpost.com/joseph-v-micallef/is-france-right-to-ban-th_b_11845732.html.
259. Lizzie Dearden, *Burkini Ban Suspended: French Court Declares Law Forbidding Swimwear Worn by Muslim Women 'Clearly Illegal,'* INDEP. (Aug. 26, 2016), http://www.independent.co.uk/news/world/europe/burkini-ban-french-france-court-suspends-rule-law-forbidding-swimwear-worn-muslim-women-seriously-a7211396.html.
260. *See id.*
261. *See* Micallef, *supra* note 258.
262. *Id.*
263. *See* Radhika Sanghani, *Burka Bans: The Countries Where Muslim Women Can't Wear Veils*, TELEGRAPH (July 8, 2016, 7:00 AM), http://www.telegraph.co.uk/women/life/burka-bans-the-countries-where-muslim-women-cant-wear-veils/.
264. Heider, *supra* note 109, at 93; Micallef, *supra* note 258.

nuanced lens to evaluate and resolve the competing women's rights at stake that arise in regulating certain practices of immigrant women.